

requiring or mandating a quantification standard governing the amount of children's educational and informational programming that a broadcast licensee must broadcast to pass a license renewal review."^{25/} Rather than mandating that each television station in the country carry a specific amount of such programming, Congress plainly intended to provide the licensee with what Senator Inouye, floor manager of the legislation, called "the greatest possible flexibility in how it discharges its public service obligation to children."^{26/}

Indeed, while indicating the expectation that each television station would present "some" programming specifically designed to serve the educational and information needs of children, both Committee reports made clear that broadcasters could also rely on programming intended for general family viewing as contributing to meeting their obligations under the Act.^{27/} Significantly,

^{25/} H.R. Rep. No. 385, 101st Cong., 1st Sess. 17 (1989) ("House Report"); S. Rep. No. 227, 101st Cong., 1st Sess. 23 (1989) ("Senate Report"); 136 Cong. Rec. S10122 (July 19, 1990) (remarks of Senator Inouye).

^{26/} 136 Cong. Rec. S10122 (July 19, 1990).

^{27/} Senate Report at 17, 23; House Report at 17; 136 Cong. Rec. S10122 (July 19, 1990) (remarks of Senator Inouye). A good example of programming intended for general family viewing which serves the needs of the (Footnote continued to next page)

both Committee reports also emphasized that "[t]he appropriate mix" of such programming would be "left to the discretion of the broadcaster."^{28/}

In addition, Congress expressly provided in Section 103(b) of the Act that the Commission could consider, in determining whether a station had fulfilled its service obligation to children, (i) any "nonbroadcast efforts ... which enhance the educational and informational value of [its] programming," such as the distribution of study guides or reading scripts,^{29/} and (ii) "special efforts ... to produce or support programming [serving children's educational and informational needs] by another station in the licensee's marketplace."^{30/}

(Footnote continued from previous page)

27/ child audience is the CBS Television Network's DR. QUINN, MEDICINE WOMAN, which we believe provides a positive and humane viewing experience particularly appropriate for children.

28/ Senate Report at 23; House Report at 17.

29/ 136 Cong. Rec. S10122 (July 19, 1990) (remarks of Senator Inouye). See also Senate Report at 8 (commending CBS's "Read More About It" and "Teacher's Guides" programs.)

30/ Pub. L. No. 101-437, Section 103(b), 47 U.S.C. § 303b(b).

It is clear, therefore, that Congress did not intend a broadcaster's compliance with the Children's Television Act to be measured by a simple numerical test. Rather, as Senator Inouye stated, Congress "recognize[d] that there is a great variety of ways to serve th[e] unique [child] audience."^{31/} The adoption of quantitative programming standards would be inconsistent with the broad discretion which Congress intended for broadcasters in

In addition to the lack of support for quantitative standards, there is clearly no warrant in the Act or its legislative history for the scheduling requirements which the Notice suggests the Commission may impose. Not only would a requirement that all stations present weekday programming for children run directly counter to the licensee discretion intended by Congress, but it would restrict the competition and counterprogramming efforts among stations which ultimately increase the variety of programming available to both child and adult viewers. In considering whether to mandate program schedules in this manner, we urge the Commission to consider the following observations which it made ten years ago:

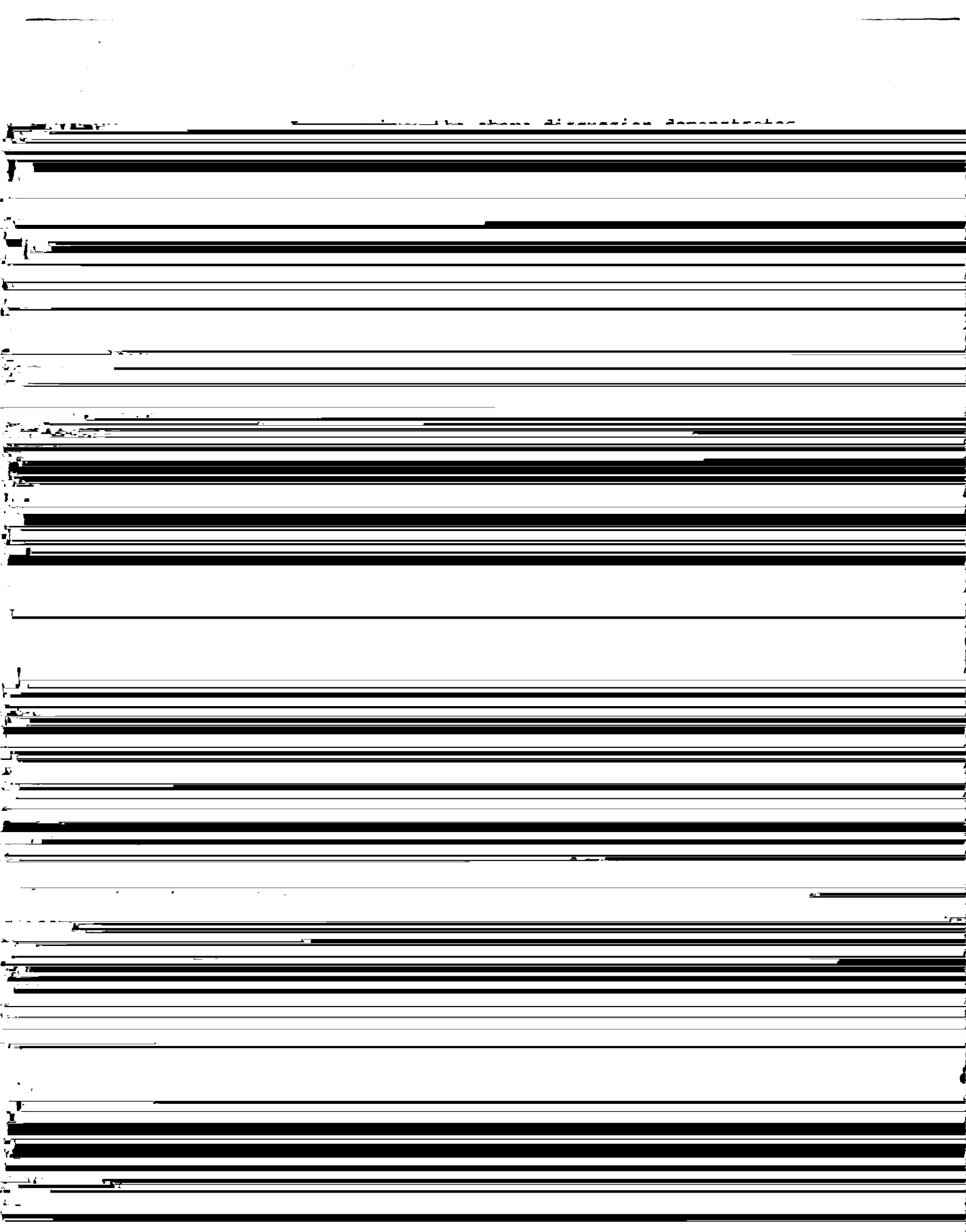
"During weekday mornings, independent (as well as public) stations in many markets compete for the child audience. Network affiliated stations concentrate on news and public affairs. On weekends, when network stations target the child audience, the independent (and the public) stations do not. As predicted, market segmentation leads to station specialization better serving the needs of the entire viewing public. Program quotas, in the absence of an extraordinarily complicated allocation mechanism, would work fundamentally against efforts to align commercial incentives with quality service to the child audience. ... They would also place the Commission in a position of having to involve itself with specific choices among preferred types of programming. We do not feel, for instance, that we should declare that children's programming in the 7:00-8:00 a.m. hour is inherently

preferable to that time being used for news programs."^{33/}

Were the Commission to require the broadcast of even a half hour of children's programming during the week, network affiliated stations would be faced with a difficult dilemma. As suggested by the Commission in the above quotation, most affiliated stations carry network news and informational programming between 7 and 9 AM Eastern time on weekdays.^{34/} During the weekday hours between 9 AM and 3 PM, all but the very youngest children are in school, and network programs, including highly popular network daytime serials, are offered until 4 PM. In the late afternoon hours preceding their local news broadcasts, many affiliated stations carry expensive syndicated programming which is "stripped" on a five day a week basis, making the clearance of a single half hour or one hour time period for all intents and purposes impractical. The prime time access period, of course, presents the same problem.

^{33/} Report and Order in MM Docket 19142, 96 FCC 2d 634, 654 (1984) (footnotes omitted).

^{34/} WUSA-TV, the CBS affiliate in Washington, also broadcasts local news programming from 6 to 7 AM and from 4 to 5 PM during the week.



licensees," but cautioned that "mandatory programming by the Commission even in categories would raise serious First Amendment questions."^{36/} And in National Black Media Coalition v. FCC, the Court of Appeals observed that the adoption of quantitative program standards "would do more to subvert the editorial independence of broadcasters and impose greater restrictions on broadcasting than any duties or guidelines presently imposed by the Commission."^{37/}

Finally, we wish to make clear our view that there would be no difference between the adoption of firm rules requiring the broadcast of particular amounts of educational and informational programming for children and processing guidelines indicating that those amounts would constitute a safe harbor for license renewal purposes. The Notice states that failure to meet the processing guideline "would not necessarily result in any sanction or non-renewal; rather it would determine the intensity of Commission scrutiny."^{38/} The reality, however, is that few broadcasters would be willing to risk the isolation of

^{36/} 516 F.2d 526, 536 (D.C. Cir. 1975) (emphasis in the original).

^{37/} 589 F.2d 578, 581 (D.C. Cir. 1978).

^{38/} Notice at 5.

their renewal applications for special scrutiny by the Commission because of their failure to meet a quantitative programming standard that would have made routine staff action possible. Indeed, the Notice properly acknowledges that "processing guidelines in the renewal area can take on the force of a rule, at least in the perception of

II. The Commission Should Make Clear That It Does Not Intend to Adopt a Restrictive Definition of Qualifying Programs.

CBS is also concerned that the Notice's comments regarding the type of programming on which licensees should focus in meeting their obligations under the Act may signal a departure from the broad standard which Congress intended. Thus the Notice suggests that the "core" qualifying programs on which licensees place primary reliance in meeting the Act's renewal standard should have as their "explicit" purpose service to the educational and informational needs of children, with entertainment being merely an "implicit" goal.^{41/}

To the extent that this statement means that the "core" programming relied on by a station should have more than the minimal and incidental educational value that might be attributed to virtually any children's program, we would not take exception to it. We urge the Commission to make clear, however, that it does not mean to suggest that licensees may place primary reliance only on programs which might be considered "instructional" in an academic sense, or which are primarily designed to teach children about the subjects they study in school. Such a standard

^{41/} Notice at 5.

would clearly be contrary to the broad discretion which Congress intended to afford licensees in meeting their service obligations to children.

Thus, it is clear that Congress meant to give a broad meaning to programming designed to serve children's "educational and information" needs. As Senator Inouye explained:

"Educational and informational needs encompass not only intellectual development, but also the child's emotional and social development. Pro-social programming which assist children to discover more about themselves, their families, and the world would qualify."^{42/}

The House and Senate reports both noted that

"~~entertainment~~" programs can be counted toward meeting the

example, as a program that "encourage[s] pro-social behavior" and "includes entertainment and informational material."^{44/} Other examples expressly cited by the report included a prime time entertainment program on the ABC Television Network, LIFE GOES ON, and several Saturday morning network animated shows (WINNIE THE POOH AND FRIENDS, THE SMURFS).^{45/}

Based on the "open minded perspective taken in the legislative history," the Commission in adopting regulations to implement the Act defined educational or informational children's programming as including programming that "furthers the positive development of the child in any respect, including the child's cognitive/intellectual or emotional/social needs."^{46/} In so doing, the Commission expressly rejected a proposal that it adopt a modified version of its former definition of "instructional" programming, which would have included programming "furthering an understanding of literature, music, fine arts, history, geography, and the natural and

^{44/} Senate Report at 7-8.

^{45/} Id.

^{46/} Report and Order at 2114.

social sciences," as well as children's news broadcasts and health related programs.^{47/}

In the present Notice, the Commission suggests that its proposed "clarification" of the definition of educational programming may help licensees with the "difficult and subjective task" of distinguishing the relative educational merit of the programs approvingly cited in the legislative history (e.g., PEE WEE'S PLAYHOUSE, WINNIE THE POOH AND FRIENDS, and the SMURFS) from programs cited in some license renewal applications which the Commission clearly does not regard as being educational (e.g., THE FLINTSTONES or G.I. JOE). Although we believe that there is a distinction between the educational and informational content of these programs of which the Commission may properly take cognizance, we do not believe the standard proposed by the Notice would prove to be a helpful one. As the Congress recognized, programs such as PEE WEE'S PLAYHOUSE and WINNIE THE POOH AND FRIENDS have distinct educational value to children. However, the question of whether education is the "primary objective" of these programs, or their "explicit" as

^{47/} Id. See, Notice of Proposed Rulemaking in MM Docket Nos. 90-570 and 83-670, 5 FCC Rcd 7199, 7200 n.30 (1990).

opposed to "implicit" purpose, is neither meaningfully ascertainable nor a test consistent with the legislative intent that licensees be afforded maximum flexibility in meeting their obligations under the Act. For the Commission to inquire into whether children's programs which have legitimate educational elements are nonetheless "primarily" intended to serve an educational purpose would, we submit, be plainly at odds with Congress' "expect[ation] that the Commission will continue to defer to the reasonable programming judgments of licensees in this field."^{48/}

Just as importantly, the standard proposed by the Commission might well hinder rather than promote the production of creative and engaging programs that children will actually watch. Where children are concerned, an absolute dichotomy between education and entertainment is

^{48/} 136 Cong. Rec. S10122 (July 19, 1990) (remarks of Senator Inouye). Such a test would also tend to draw the Commission deeply into the review of licensee programming judgments, thus raising sensitive First Amendment questions. See, e.g., Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 127 (1973); see also Senate Report at 17 (legislation meets constitutional requirements because, inter alia, "[i]t does not exclude any programming that does in fact serve the educational and informational needs of children; rather the broadcaster has discretion to meet its public service obligation in the way it deems best suited.")

a false one; the most instructional children's program will be ineffective if it is not sufficiently entertaining to attract and hold children's attention and interest. Child viewers will best be served, we submit, if the creativity of program producers and broadcasters is not unduly constrained by concerns about whether worthwhile children's programs which they wish to develop will be deemed "primarily" educational by the Commission.

In this connection, we note as well that some of the most acclaimed children's series -- programs like CBS SCHOOLBREAK SPECIAL and FAT ALBERT AND THE COSBY KIDS -- are not instructional in any academic sense, but derive their value from the lessons they impart to young viewers about positive personal and social behavior. A Commission definition of educational and informational programming which tended to exclude such programs -- and thus discourage their production -- would hardly serve the interests of the child audience.

We emphasize that the above discussion is not meant to suggest that the Commission must accept at face value licensee assertions that THE FLINTSTONES teach children about history or that superhero cartoon shows

illustrate that good is better than evil.^{49/} Where the Commission questions such judgments, however, it should focus on whether the licensee can reasonably conclude that the program, taken as a whole, has substantial educational, informational or pro-social value to children -- not on the highly subjective, and largely irrelevant, question of whether the "primary" purpose of the program is education or entertainment.

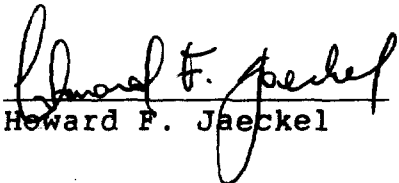
CONCLUSION

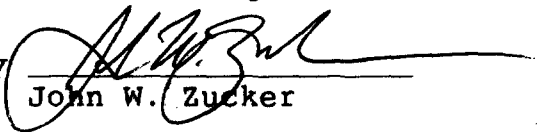
CBS is committed to compliance with the objectives of the Children's Television Act. The changes in children's programming which are beginning to become apparent, we submit, demonstrate that this commitment is widely shared in the industry. CBS urges the Commission not to adopt regulatory measures which would upset the careful balance struck by Congress in crafting this

^{49/} We also do not intend to disparage such programs, which can have legitimate entertainment value for children.

legislation, particularly before a more complete
assessment of the Act's success is possible.

Respectfully submitted,
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May 7, 1993